

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

PRAVEEN KHURANA,

Plaintiff,

vs.

CITY OF NEWPORT, et al.

Defendants.

No. CV-13-00181-JLQ

ORDER RE: PENDING MOTIONS

BEFORE THE COURT are currently five pending motions. Defendants Loyce Akers and Josh Sutton filed a Motion to Dismiss (ECF No. 16) directed to the First Amended Complaint on September 23, 2013. Defendant City of Newport filed a Motion to Dismiss (ECF No. 24) directed to the First Amended Complaint on October 16, 2013. In response to the Akers/Sutton Motion to Dismiss, Plaintiff filed an Affidavit and requested that the court treat the Motion to Dismiss as a motion for summary judgment. (See ECF No. 26 & 27). On November 5, 2013, Akers/Sutton filed a Motion to Strike Plaintiff's Affidavit. (ECF No. 36). On November 7, 2013, Plaintiff filed a Motion to Add or Correct Named Defendant (ECF No. 38) which seeks to add Pend Oreille Festival Association or substitute Pend Oreille Festival Association for Lavender Festival Association. Plaintiff filed a Second Amended Complaint on December 12, 2013, without leave of court. Then, on December 18, 2013, Plaintiff filed a Motion to Amend (ECF No. 55), along with a proposed Second Amended Complaint.

I. Motion for Leave to Amend (ECF No. 55)

Plaintiff has filed a Motion for Leave to file a Second Amended Complaint (the "SAC"). The SAC is actually Plaintiff's fourth attempt at pleading. He filed a Complaint, which was screened by the court, and in response to the court's Order he filed a First Amended Complaint. (ECF No. 6). Plaintiff then filed a Second Amended

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2 Complaint (ECF No. 49) without leave of court. Plaintiff now files the proposed SAC,
3 which is not the same pleading as ECF No. 49, although both were captioned as Second
4 Amended Complaints. The court recently held a Scheduling Conference and set a
5 deadline for joinder of parties and amendment of pleadings of December 23, 2013.
6 Thus, Plaintiff's Motion (ECF No. 55) is timely filed.

7 Plaintiff is required to seek leave of court or stipulation of the parties to make the
8 amendment because he has already once amended. Fed.R.Civ.P. 15(a). Additionally,
9 Akers, Sutton, and the City have already filed Motions to Dismiss. Federal Rule of Civil
10 Procedure 15 provides that leave to amend should be freely given when justice so
11 requires. Whether to grant such leave rests in the discretion of the court. *Foman v.*
12 *Davis*, 371 U.S. 178, 182 (1962). Generally, a court should not deny leave to amend
13 unless there has been undue delay, bad faith, or dilatory motive on the part of the
14 movant, or where the amendment would result in undue prejudice to the opposing party,
15 or where amendment would be futile. *Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d
16 981, 1007 (9th Cir. 2009). Additionally, Plaintiff is proceeding pro se and pro se litigants
17 are afforded some leniency in pleadings. However, the Ninth Circuit has instructed that
18 "pro se litigants in the ordinary civil case should **not** be treated more favorably than
19 parties with attorneys of record." *Jacobsen v. Filler*, 790 F.2d 1362 (1986)(emphasis
20 supplied).

21 The court will allow Plaintiff this **last and final** amendment. The court will
22 **GRANT** the Motion to Amend. However, as the proposed SAC names two additional
23 individual Defendants, Officers Olsen and McKay, the court has determined that
24 additional screening is required prior to service. When a *pro se* litigant is proceeding *in*
25 *forma pauperis* ("IFP") this court must review the complaint to determine if it is legally
26 sufficient. The court must dismiss the case if Plaintiff has raised claims that are
27 "frivolous or malicious", that fail to state a claim upon which relief can be granted, or
28 that seek monetary relief from a defendant who is immune from such relief. 28 U.S.C. §
1915(e)(2). The statute provides that if "at any time" the court determines that the

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2 allegations fail to state a claim, it "shall dismiss the case". Therefore, the court will
3 screen the SAC, and if appropriate, direct service on counsel for the parties who have
4 already appeared and on the newly named Defendants if Plaintiff has stated a claim
5 against them.

6 **II. Motion to Add or Correct Named Defendant (ECF No. 38)**

7 Plaintiff's Motion (ECF No. 38) evidences uncertainty as to the relief sought.
8 Plaintiff states that he wants to add a party "or" amend to substitute the name of another
9 party. It's unclear whether this is a case of misnomer, where Lavender Festival
10 Association should have been named Pend Oreille Festival Association, or whether there
11 are two separate entities. Plaintiff invokes Fed.R.Civ.P. 20(a) concerning permissive
12 joinder, which allows a defendant to be joined if certain requirements are met, including
13 that a right to relief is asserted against the party to be added. Plaintiff's Motion does not
14 clearly identify what right to relief is asserted against Pend Oreille Festival Association.
15 Defendants Akers and Sutton respond to the Motion and "acknowledge they were
16 volunteers for the Pend Oreille Festival Association at the time of the events alleged in
17 the First Amended Complaint." (ECF No. 44). Akers and Sutton argue that Plaintiff's
18 Motion is not properly supported and that he has not properly sought leave to amend his
19 complaint. Defendants also suggest that Plaintiff's filing is "tactical" or "gamesmanship"
20 intended to avoid the pending Motion to Dismiss.

21 On December 2, 2013, Plaintiff improperly filed a "Second Amended Complaint"
22 (ECF No. 49) that was submitted without leave of court and in violation of Fed.R.Civ.P.
23 15(a)(2). The Second Amended Complaint does not name Pend Oreille Festival
24 Association in the caption. Additionally, the Second Amended Complaint still asserts
25 claims against the Lavender Festival Association. The proposed SAC, filed on
26 December 18, 2013, also does not name the Pend Oreille Festival Association in the
27 caption. The portion of the SAC designated as, "Parties" (para. 1.1 to 1.7), discusses the
28 Lavender Festival but does not describe the Pend Oreille Festival Association as a
Defendant. Accordingly, the court finds that Plaintiff has abandoned the Motion. He

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2 has filed a subsequent Motion seeking leave to amend which does not seek to add the
3 Pend Oreille Association as a Defendant. The Motion is denied as moot.

4 **IT IS HEREBY ORDERED:**

5 1. The Motion to Amend (ECF No. 55) is **GRANTED**. The court will review the
6 proposed SAC (ECF No. 55-1) and direct service as appropriate after determining which
7 counts state a claim upon which relief can be granted.

8 2. The previously filed "Second Amended Complaint" (ECF No. 49), which was
9 filed without leave of court, and which Plaintiff has superceded with ECF No. 55-1, is
10 **STRICKEN**.

11 3. The Motions to Dismiss (ECF No. 16 & 24) are **DENIED AS MOOT**.

12 4. The Motion to Strike Affidavit (ECF No. 36) is **DENIED AS MOOT**.

13 5. The Motion to Add or Correct Named Defendant (ECF No. 38) is **DENIED AS**
14 **MOOT**.

15 6. While the court is reviewing Plaintiff's SAC pursuant to 28 U.S.C. § 1915, the
16 parties may continue to engage in discovery and the deadlines as set forth in this court's
17 recent Scheduling Order (ECF No. 53) remain in full force and effect.

18 **IT IS SO ORDERED.** The Clerk is hereby directed to enter this Order and furnish
19 a copy of this Order to Plaintiff and to counsel.

20 DATED this 23rd day of December, 2013.

21 s/ Justin L. Quackenbush
22 JUSTIN L. QUACKENBUSH
23 SENIOR UNITED STATES DISTRICT JUDGE
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